1996

State of Utah v. Bradley C. Davis and Holly H. Hyatt : Reply Brief

Utah Court of Appeals

D. Bruce Oliver; Attorney for Appellants.
Thoms B. Brunker; Assistant Attorney General; Jan Graham; Utah Attorney General; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff and Appellee, vs. BRADLEY C. DAVIS and HOLLY H. HYATT, Defendants and Appellants.	Case No. 960271-CA Priority No. 2 **Oral Arguments Requested**

REPLY BRIEF OF APPELLANTS

Consolidated Appeals from the Final Judgment
and Guilty Verdicts of the
Fifth Judicial District Court, County of Iron
State of Utah, by the Honorable Robert T. Braithewaite.

D. Bruce Oliver (5120)
D. BRUCE OLIVER, P.C.
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1490

Attorney for Appellants

Thomas B. Brunker (4804)
Assistant Attorney General
JAN GRAHAM (1231)
UTAH ATTORNEY GENERAL
Heber Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

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UTAH ATTORNEY GENERAL
Heber Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for Appellee

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D. Bruce Oliver #5120
Attorney for Defendants and Appellants
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1218
Telephone: (801) 328-8888
Fax: (801) 595-0300

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Appellant Davis was on probation for a misdemeanor theft in Kane County; Appellant Hyatt was not on probation, nor had she been suspect of illegal conduct. Because an officer, one night, witnesses Appellant Davis run into a man at a truck stop, who the day earlier was arrested for possession of a drug paraphernalia, the appellant's probation officer and other agents conducted a search of the couples' home and vehicles. The agents lacked a reasonable facts to suspect that the appellants' were committing a public offense. Nonetheless, the agents do find small amounts of drugs and the appellants were subsequently charged with possession with intent to distribute.

Pursuant to the Utah Rules of Appellate Procedure Rule 24 (c), the appellants hereby reply to the Appellee's new matters set forth as follows:

POINT I.
DE NOVO REVIEW FOR CORRECTNESS CANNOT SUPPORT THE SEARCH; THE SEARCH LACKED REASONABLE SUSPICION

Even though the appellee states the correct standard of review for which this court must consider this matter. The State attempts to oppose this appeal by arguing that the appellants must show and overcome a standard of abuse of discretion with regards to the trial court's denial of their pretrial Motion to Suppress. The appellee is wrong, the Appellants do not have to show that the trial exceeded its discretion, but rather this Court reviews this matter de novo, according no deference to the trial court.

On de novo review, the appellants rely raise one fact for this Court consideration. The only articulable fact that is not irrelevant nor stale to this matter is Appellant Davis' association with Mr. Blackburn--who was previous to this date cited for possession of a drug paraphernalia. However, this Court reiterated in State v. Munsen, 821 P.2d 13 (1991), that the mere propinquity of others is not sufficient evidence to support a suspicion of criminal wrong doing.

In defense of this position, the Appellee argues that there was a total of eight facts which the agents relied on creating their supposed reasonable suspicion. Note: The State does not deny the fact that it was the officer's observation at the truck stop which initiated the search, the State's inclusion

of the seven other facts are to attempt circumvent the "mere propinquity" standard set by this Court.

By the numbers, the analysis of the State's alleged facts are as follows:

Alleged Fact No. 1

> [S]ix days prior to the search, Davis had already violated the terms of his probation by possessing drug paraphernalia, possessing a firearm and [admitting to] using marijuana and methamphetamine.

(R. at 822-(67)).

This may be true, if indeed the agents of Adult Probation and Parole had felt that this circumstance gave rise to action on their part they should have acted then. Either a search or a motion for a show cause hearing would have been appropriate at that time. The agents waived any right to act on this by deciding not to take action. Hence, six days later, the information was stale and could not have been the basis for a search some time later.

Alleged Fact No. 2

> [T]he evening prior to the search, police officers [in Washington County] arrested Milby for possessing methamphetamine, and cited Blackburn for possessing drug paraphernalia.

(R. at 822-(13-14, 2-23)).

This information even taken in the light most favorable to the State proves nothing against the appellants. Moreover, the conduct of these two are irrelevant to these proceedings. The

parties, Milby and Blackburn, are entitled to the presumption of innocence until proven guilty, the disposition of those two proceedings are unknown and irrelevant to these proceedings.

Alleged Fact No. 3

> [T]he arrest triggered an investigation of Milby for possible poaching and further drug activity.

(R. at 822-(22)).

This information even taken in the light most favorable to the State proves nothing against Davis and Hyatt. This investigation is clearly irrelevant to the appellants.

Alleged Fact No. 4

> Milby was a known drug user and possibly a drug dealer.

(R. at n/a).

This information is speculative at best. While it appears valid that Milby was arrested for possession of Methamphetamine, it is not shown that this information is generally known, and or that the information made Milby a "known criminal". Further there is no connection between the appellants and Milby. Furthermore, the State fails to cite to the record regarding this alleged fact.

Alleged Fact No. 5

> [O]nly a few hours after Milby's arrest and in the course of the investigation of him, a police officer saw Davis approaching Milby's house at 2:00 a.m.

(R. at 393).

This information even taken in the light most favorable to the State proves nothing against the appellants.

Alleged Fact No. 6

> [A]t that time, Blackburn's truck was parked outside of Milby's house with the engine running, and all of the lights were on in Milby's house.

(R. at 392, 822-(23-24)).

This information even taken in the light most favorable to the state proves nothing against the appellants.

Alleged Fact No. 7

> Davis started to pull in to Milby's driveway, then turned and accelerated away from the home when he saw a police officer watching it.

(R. at 393, 822-(24)).

This information even taken in the light most favorable to the state proves nothing against the appellants.

Alleged Fact No.8

> [T]he police officer saw Davis meet Blackburn at a truck stop a shortly [sic] after Davis had aborted his visit to Milby's house.

(R. at 822-(26) & 822-(38-40)).

What the police officer actually observed was that Davis went to the truck stop and then independently of any of the above enumerated events, Blackburn goes to the same truck stop. Then while at the truck stop, there is no actual contact made between

the two men, not even a hand shake. (R. at 822 (26, 38-40)).

Under the totality of the circumstances, a review of these facts indicates other more logical inferences of innocent behavior. Davis and Blackburn had planned to meet at the truck stop for what ever reason, breakfast, coffee, conversation, etc, (r. at 822-(39-40),) . . . Davis was on his way to the truck stop, but detoured first to see if Blackburn had left Milby's residence yet. When Davis drove by and saw Blackburn's truck warming up, he decided to move on directly to the Sunshine Truck Stop, as Blackburn would be following shortly. Thus, all of these facts in this matter do not depart from Munsen, rather they support the decision of Munsen. The officer did not observe anything illegal about the two individuals. He did not see them exchange anything, not even a hand shake. Moreover, the officer looked into the back of Blackburn's pick up to find only clean, white snow. (R. at 822-(39-40)).

The appellee's version of the events that took place that evening, sound much like paranoia. The State would like this court to adopt its contention that Davis "pulled away from the house when he noticed a police officer watching him" and this suggests that "he had a less innocent reason for his visit." See, Br. of Appellee at 16. Why didn't Davis race home then in fear when he saw the officer? Why didn't Davis run to the nearest telephone and give the alarm to Milby or Blackburn? How did Blackburn know to meet Davis at the truck stop? Why didn't Davis "abort" the meeting with Blackburn at the truck stop after the officer approached Davis with his questions? Either Davis was overconfident or just plain innocent.

The facts suggest that Davis wasn't concerned about the officer encounter because, evidently, Davis didn't feel any threatened by the officer encounter implicitly because he wasn't involved in any criminal activity. Remember, six days prior Davis admitted some use of drugs, and logically he should have no longer been involved in any drug activity. Why would he continue? Why wouldn't it be reasonable for officers to believe that any suspicion wouldn't be stale now? Furthermore, remember, that an individual's desire to avoid a level one encounter cannot be used against the individual to create reasonable suspicion.

Whether taken individually or **collectively**, there is no indication that Davis was violating any condition of his probation at the time of the search, November 21, 1994. There was no reasonable suspicion that Davis was violating his probation at the time of the search, November 21, 1994.

The State has mustered all the facts it could to support it's position, no matter how irrational some of the facts may be. The State relies a lot on speculation and fill-in-the-blanks to justify the search and defend this appeal. Collectively these facts may have given rise of concern to a probation officer; however, there was not sufficient articulable facts to create a reasonable suspicion that Davis was violating his probation or to justify the search on November 21, 1994.

POINT II.
STATE V. JOHNSON IS DISTINGUISHABLE FROM STATE V. HYATT.

The State further argues that Ms. Hyatt had voluntarily surrendered some or all of her expectation of privacy because she

lived with Mr. Davis. The only way this search and the fruits thereof could be used against Ms. Hyatt is if she had a lessened expectation of privacy. This is because there certainly were not sufficient facts to form a basis for "**probable cause**" to get a search warrant issued. The case cited by the State (State v. Johnson, 748 P.2d at 1073-74) for which they hold that the level of expectation of privacy of the co-tenant is diminished is distinguishable. In Johnson, it was the person on probation that attempted to use the expectation of privacy of a co-tenant to expand his constitutional protections. In this case, Ms. Hyatt asserts this protection on her own behalf. There has been no challenge to Ms. Hyatt's standing to challenge the search. In Johnson, the mother lacked standing to challenge the search. this is clearly not the case in this matter.

POINT III.
THE SOLE CONCLUSION THAT THE PROPERTY WAS STOLEN DOES NOT RELIEVE THE STATE OF THE BURDEN TO PROVE DAVIS KNEW THE ITEMS TO BE STOLEN.

Utah Code Annotated Section 76-1-501, states:

> A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In the absence of such proof, the defendant shall be acquitted.

Id. In this case, the State argues that the jury could only conclude that the property was stolen. This of course is an assumption that there were no other reasonable alternatives as to the disposition of the property. The requirement placed upon the State was to show that the property was received by an individual knowing that it had been stolen.

While the State argues that after hearing the testimony of the witnesses the jury had no alternative to conclude that the property was stolen, it was also very evident that there was a substantial period between the time when the property was supposedly stolen and the time the property was recovered from Mr. Davis. (R. at 740-44, 721-30). There was no evidence connecting Mr. Davis with the property as to his knowledge that the property was stolen. As a matter of fact it was left to the jury to conclude that the property was stolen. All of this testimony did no go one bit to establish the knowledge of the appellant. Thus, the State failed to prove a critical element of this charge.

POINT IV.
DEFENSE COUNSEL TIMELY OBJECTED TESTIMONY.

At the time of trial, counsel for the appellants objected to allowing the testimony of both Danny Balduck and Blake Bentley. Although the first objection was not on the record because the court used the mute button on the bench to mute the argument. (R. at 677) It is not the belief of the appellants or defense counsel that this was done for any improper purpose but rather as a matter of practice by the court. Even though, this first objection was referred to by Mr. Burns, when he attempted to justify the use of the witnesses by arguing "It's also relevant to show lack of mistake, identity, modus operandi --." (R. at 702-3, 738-39). The objection was raised and re-addressed discussing the two individuals testimony. The judge allowed the testimony on those grounds and chose to disregard

defense counsel's objections. Regarding the testimony of both witnesses, defense counsel argued its prejudicial effect regarding the Utah Rules of Evidence 403 and 404(b). The testimony provided did not conform with 404(b). (R. at 677-708).

The appellants are not raising this argument for the first time on appeal, but it was addressed at the time these witnesses were offered by the State on the morning of the second day of trial. These two witnesses were not even disclosed or identified to defense counsel until just prior to the time of trial.

The explanation of what took place at the time of trial and in the newspaper as contained at page 18-20 of Appellants' brief is to further explain both the intent of the prosecutor, what he felt he accomplished (the newspaper article). Clearly what he told the judge in response to defense counsel's objections to these witnesses and what the impact was on the jury were entirely different. With this in mind, the validity of the jury's decision is substantially doubted. The Court shouldn't find any confidence the jury's verdict based upon the statements of the judge and prosecutor at the time of trial.

CONCLUSION

Based upon the foregoing, the Appellants request this Honorable Court to find no merit in the Brief of Appellee. The probation officers lacked reasonable suspicion to search Mr. Davis and they had no right to search Ms. Hyatt. Out of the eight facts that the State relies on to support reasonable suspicion, only one is not irrelevant or stale; that is the visit

with Mr. Blackburn at the truck stop. However, perceivably other innocent activity are certainly presumed and would have been more logically drawn therefrom than which was drawn by these officers. The propinquity of others who are, have, or may be involved in criminal activity reasonable is insufficient to support reasonable suspicion to conduct a search of a probationer.

Secondly, the prosecution failed to prove that Mr. Davis was in possession of stolen goods knowing them to be stolen.

Therefore, this Honorable Court should vacate the orders reversing the convictions entered against the appellants. Moreover, the appellants should be awarded reasonable attorney fees and costs.

RESPECTFULLY SUBMITTED this 16th day of November, 1997.

D. BRUCE OLIVER
Attorney for Defendants and Appellants

CERTIFICATE OF MAILING

I, D. Bruce Oliver, hereby certify that on this 16th day of November, 1997, I served a copy of the foregoing **REPLY BRIEF OF APPELLANTS** upon the counsel for the Appellee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Thomas B. Brunker
Office of the Attorney General
Heber Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Dated this 16th day of November, 1997.

ADDENDA

Utah Rules of Evidence 403

Utah Rules of Evidence 404(b)

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Advisory Committee Note. — This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 402 [Rule 403]. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." See also Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1977) (surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314 (Utah 1979); State v. Johns, 615 P.2d 1260 (Utah 1980); Reiser v. Lohner, 641 P.2d 93 (Utah 1982).

Compiler's Notes. — The bracketed reference to "Rule 403" in the Advisory Committee Note to Rule 403 was inserted because Rule 402 does not refer to "unfair prejudice" and Rule 403 appears to be the correct reference.

Cross-References. — Admissibility of evidence, Rules of Civil Procedure, Rule 43(a).

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Amended effective October 1, 1992.)